

Attachment B

Modified and New Language Including Purpose and Intent

(Regarding: Draft 2 of Restructured Agreement for Water Supply dated 1/9/04)

In preparing this analysis I compared language in the Agency's second draft of the Restructured Agreement for Water Supply (1/9/04 Draft) to language agreed upon by the WAC as of the close of November 2003 and found:

1. no material significant differences regarding language pertaining to water conservation, water management planning or governance,
2. substantial language included dealing with recycled water and local supply projects, watershed planning and restoration, and environmental enhancement and ESA issues, and
3. new language on matters that have not been negotiated by the parties.

In the following analysis, language included regarding item 2 above is designated "Modified" since the parties have seen and debated most of this language during the course of negotiations but have not agreed upon same. Item 3 language is referred to as "New". The purpose and intent of proposing both "Modified" and "New" language, as stated by the Agency, is also set forth.

Not Included in Analysis: Unless it was deemed to have a significant negative impact on existing WAC members, not covered in this analysis is language relating to adding the Town of Windsor as a "prime" or changing Forestville W.D from a "prime" to an "other Agency customer". Also not covered is language included by the Agency to deal with facility issues pertaining to the Wholer-Forestville Pipeline and associated facilities, Kawana Springs Reservoir, Oakmont Pipeline, Eldridge-Madrone Pipeline, Ely Pumping Plant, etc. Based on prior commentary of WAC members, these are treated as minor or housekeeping issues that should be left up to the Agency and affected party to work out with final review and approval by the WAC. Also not covered is new language pertaining to bond covenants, the bond trustee(s) and related ordinances of the Agency.

John Olaf Nelson

Part 1 - General

1.2 Definitions

(b) “additional facilities”

New: Here, appearing for the first time in the agreement draft, we see reference to a structural change which reoccurs in many sections* throughout the draft – namely the replacement of the term “entitlements”, which the previous language of this section noted were “delivery obligations” of the Agency, with the term “water delivery quantities and limitations” which the new language of this section now defines as “deliveries authorized” under the agreement.

Purpose/Intent: The intent of this change is to make the agreement language more consistent given the existing delivery obligations of the Agency. The term “entitlement” suggests that the water contractors have an absolute right to delivery of specific quantities of water. However, under the existing agreement, the Agency’s delivery obligation is, as it always has been, subject to a number of conditions. These conditions now include (a) deficiencies in the amount of water the Agency may divert from the Russian River, (b) limitations resulting from ESA or other environmental regulations, and (c) limitations resulting from temporary impairments of transmission system capacity. In addition, delivery of water up to the quantities contained in section 3.1 requires the completion of additional facilities.

The terms used in the new draft are consistent with the existing language of section 3.1(a) of the existing agreement: “The Agency shall not be obligated to deliver water in excess of the following:” The delivery figures historically referred to as “entitlements” are, in fact, the *maximum* quantities that the Agency is required to deliver. Several recent court cases have criticized use of the term “entitlements” in water supply agreements where there is no present ability to deliver water up to the “entitlement” figures. The proposed changes will more accurately describe the rights of the contractors to water deliveries. The proposed changes do not change the water contractors’ substantive rights.

* Sections where reference to “entitlements” is changed”: 1.1 (b), 1.3, 1.6 (b), 2.2, 3.1, 3.3, 3.5, 3.12, and 4.6.

(c) “capital cost”

New: Prior definition is expanded by addition of the following underlined words “.....including, but not limited to,, environmental impact analysis,”

Purpose and Intent: The intent of the change is to make clear that the costs of CEQA compliance necessary to build a particular facility may qualify as “capital costs.”

(g) “other Agency customers”

New: Recognizes California-American Water Company (with respect to the Larkfield Water District), the State of California, and Santa Rosa Junior College as being other Agency customers.

Purpose and Intent: Update list of other Agency customers.

(u) “Recycled Water Sub-charge” and “Recycled Water Fund”

Modified: While discussed at some length, parties never came to agreement on a recycled water charge.

Purpose/Intent: To address/include recycled water projects.

(v) “recycled water project”

Modified: Expands definition of recycled water project to: (1) include Agency projects, (2) projects which produce or deliver recycled water, and (3) projects which provide an environmental benefit or assist the Agency to comply with Federal and ESA or other environmental law or regulations.

Purpose/Intent: To address/include all beneficial recycled water projects.

1.3 Term of Agreement

New: Deletes following renewal commitment and associated terms:

“The Agency shall enter into renewal agreements for periods not to exceed forty years each with any or all of the water contractors requesting the same for water supplies within the delivery capabilities of the Agency's Transmission System, at a cost no greater than the Agency's operation and maintenance costs and unreimbursed capital costs allocated on a proportionate use basis, it being understood that such renewal agreements shall provide for entitlements to the quantities of delivery to each customer as set forth herein.”

Purpose/Intent: Limit Agency's obligations and commitment to renew agreement.

1.13 Recycled Water and Local Supply Project Requirements

Modified: Parties had not reached agreement on recycled water and local supply project provisions. Agency draft includes some of the provisions last discussed by parties as follows:

“Within ten (10) years from the effective date of this Agreement, the water contractors shall use their best efforts to carry out or participate in recycled water or local supply

projects capable of delivering recycled water or potable water sufficient to reduce the water contractors' collective deliveries from the Transmission System (including, in the case of Windsor, reductions in withdrawals from Windsor's Russian River wells), by at least 7,500 acre-feet per year, with approximately 50% of such reduction resulting from recycled water projects."

Purpose/Intent: Include requirements for recycled water and local projects.

Part 2 - Acquisition, Construction, Operation and Maintenance

2.6 Recycled Water and Local Supply Projects

Modified: Parities had not reached agreement on recycled water and local supply project provisions. Agency draft includes many of the provisions last presented to and discussed by the parties as follows:

"Subject to the approval of the Water Advisory Committee, the Agency may (a) construct, fund, or partially fund the capital cost of local recycled water projects and local supply projects, or (b) enter into agreements for the acquisition and sale of recycled or reclaimed water (or the rights to recycled or reclaimed water). The Agency and the water contractors shall seek financial contributions for local recycled water and local supply projects funded under this section from benefited wastewater treatment plant owners, sanitation districts, and other benefited parties. Projects constructed, funded, or partially funded by the Agency under this section shall not be part of the Transmission System, and the operation and maintenance cost of such projects shall be the responsibility of the water contractors or other parties carrying out, sponsoring, or participating in such projects. The capital costs (including Revenue Bond obligations, if any) of local supply projects or recycled water projects or of acquiring recycled water or the rights thereto shall be paid from the Recycled Water Fund."

Purpose/Intent: Include provisions for acquisition and construction of recycled water and local supply projects.

2.8 Watershed Planning and Restoration

Modified: Parities, while narrowing their differences principally to subsection (c), had not reached agreement on all of the watershed planning and restoration provisions. Agency draft includes virtually all of the provisions presented to and discussed by the parties as follows:

"(a) The Agency may undertake any action, study, or project approved by the Water Advisory Committee related to (1) the development or implementation of watershed restoration and maintenance plans and projects (including, but not limited to, stream restoration projects, water quality monitoring studies and projects, public education and outreach activities, and funding of third-party studies and projects) or (2) groundwater studies and investigations. Before undertaking any such action, study or project: (1) the

Agency shall consider suggestions received from the public, water contractors, and interested parties and organizations such as the Russian River Watershed Association as to the actions, studies, and projects to be undertaken by the Agency hereunder; and (2) the Agency and the water contractors shall use their best efforts to obtain funding contributions from other parties that would benefit from the actions, studies, or projects authorized hereunder, including but not limited to federal and state loans and grants, municipalities (including Russian River Customers, county and special district governments), and urban and industrial development, gravel mining, agriculture, forest harvesting, recreation, and sport and commercial fishing interests.

(b) The authority granted to the Agency under this section 2.8 is permissive and not mandatory, and that nothing in this section 2.8 shall (1) require the Agency to undertake any action or project unless such action or project is approved by the Agency, (2) impair or affect the Agency's right to undertake any action or project not funded under this Agreement, or (3) require the Agency to engage in any regulatory activity.

(c) The Agency may carry out projects and activities within the scope of subsection (a) above that primarily or exclusively benefit one or more water contractors, provided (1) such projects and activities are approved by the Water Advisory Committee, (2) the Agency identifies the benefited water contractor(s) and (3) that each water contractor entering into an agreement with the Agency for such project or activity agree to pay supplemental charges as approved by the Agency and the Water Advisory Committee to defray all or a portion of the cost of the project or activities."

Purpose/Intent: Include provisions for acquisition, construction, operation and maintenance of watershed projects approved by the WAC.

Part 3 – Water Supply

3.1 Water Delivery Quantities and Limitations

New: As noted above under definition 1.2 (h), the term “entitlements” is deleted from the agreement. It is noted that the draft includes the Town of Windsor’s direct diversions from the Russian River thus making these a commitment for the Agency to serve from the Agency’s Russian River Water Rights, notwithstanding the fact that the Town of Windsor has applied for and may very well perfect its own rights for direct diversions. Also, inclusion of the annual limitations related to Windsor’s direct diversions impacts allocation of water during a shortage as proposed by the Agency in section 3.5 (a) and (b).

Purpose/Intent: Discussed above.

3.4 Surplus Water

New: Irrigation of land for commercial production of food and fibre (agricultural purpose) is eliminated for all but existing users holding an existing agreement.

Purpose/Intent: Eliminate/limit use of potable water as a source of supply for agricultural irrigation.

3.5 (a) Shortage of Water and Apportionment (pertaining to deficiency of water available in the Russian River)

Change 1

New: In subsection (a), “environmental laws or regulations” are added to the list of reasons for which the Agency shall not be held liable for damages due to delivery deficiencies.

Purpose/Intent: Language is consistent with existing language in section 3.5(a) giving the Agency discretion to take actions necessary to comply with ESA or other state/federal laws. Not intended to effect a substantive change in the agreement.

Change 2

New: In subsections (a), paragraphs 2, 3 and 4 pertaining to apportionment of water in event of deficient water supply in the Russian River and beginning with the words “first”, “second” and “provided”, the Agency has substituted the word “annual delivery limitation” for the word “entitlement(s)”. This has the effect of apportioning water to regular customers and MMWD, during periods when sufficient water is unavailable in the Russian River, solely on the basis of annual delivery limits or “caps” rather than “maximum monthly rates capped by annual limitations” as presented in the analysis prepared by the City of Santa Rosa (September 2, 2003).

Purpose/Intent: The existing agreement (which uses the term “entitlements”) is ambiguous because section 3.1 contains both annual “entitlements” and average day peak month “entitlements.” The new language clarifies that in situations in which there is a deficiency in the amount of water subject to diversion by the Agency from the Russian River, allocations under section 3.5(a) will be made based upon the annual limits.

3.5 (b) Shortage of Water and Apportionment (pertaining to deficiency of aqueduct delivery capacity (including head-works production capacity))

New: In paragraphs 2 and 3, pertaining to apportionment of water in event of deficient aqueduct capacity and beginning with the words “first”, and “second”, the Agency has substituted the word “annual delivery limitation” for the word “entitlement(s)” in the case where the deficiency is due to deficient head-works production capacity. This has the effect of apportioning water, during periods when sufficient production capacity is

unavailable, on the basis of annual delivery limits or “caps” rather than “maximum monthly rates”.

Purpose/Intent: As noted above, the existing agreement is ambiguous. The new language clarifies which of the delivery limitation figures will be used in specific impairment circumstances.

3.5 (c) Shortage of Water and Apportionment

New: Subsection (c) is new and adds liquidated damages amounting to 50% of O&M charge for each acre-ft of water taken in excess of allotments determined by Agency. As drafted, this penalty charge only applies to “primes”.

Purpose/Intent: Penalizes regular customers who take more than the amount allotted by the Agency in case of a deficiency or transmission system impairment. The Agency would also retain the right to take other steps to stop contractors from taking more than their respective allocations.

3.12 Marin Municipal Water Deliveries

New: Existing agreement provides that water deliveries to MMWD cannot be reduced due to inadequate capacity in the new aqueduct to be constructed generally paralleling the existing Petaluma Aqueduct. New language adds following proviso:

“.....if such new aqueduct is paid for by Marin Municipal and dedicated to the Agency pursuant to section 13 of the Amended Agreement for the Sale of Water between the Sonoma County Water Agency and the Marin Municipal Water District dated January 25, 1996.”

Purpose/Intent: Recites condition appearing in MMWD/Agency agreement.

Part 4 – Charges and Payments

4.1 (a) Separate Charges and Funds

New: Separate aqueduct charges (previously set forth in old Sections 4.3, 4.4, 4.5 and 4.6) are deleted as the bonds sold in 1955 to build these aqueducts have all been paid off. Provisions contained in these old sections pertaining to: (1) a safeguard for Agency revenue which allows for an additional aqueduct charge(s) (pick-up charge(s)) to be levied in the event of deficient revenue in any year, and (2) provision for establishing an aqueduct replacement charge; are moved to new section 4.6 (d) and (e). This title of new section 4.6 (previously entitled “Aqueduct Facilities Revenue Bond Charge” and whose purpose was to provide for revenue to pay for the Agency’s 1971 Revenue Bonds) is broadened to “Aqueduct Facilities Capital Charges” since it now includes establishment of replacement charges. I found no negative impact on WAC members by these changes.

Purpose/Intent: Elimination of language no longer needed.

4.2 (b) Operation and Maintenance Charge

Modified: Included in the O&M Charge is the cost of: Watershed Planning and Restoration (See section 4.14), and Recycled Water and Local Supply Projects (see section 4.15). While discussed and some length, the parties did not come to agreement on these two new charges.

Purpose/Intent: To regularize the method of financing the respective activities and projects.

4.6 (b) Aqueduct Facilities Capital Charge

New: Language pertaining to apportionment of revenue requirements for payment of 1971 Revenue Bond costs for construction of Intertie Aqueduct (the Intertie Aqueduct is comprised of reaches 1, 2 and 3) is deleted as these bonds have been paid off. (Note: Neither the existing agreement or this draft provide replacement costs associated with the Intertie Aqueduct Facilities. This should be addressed in the final agreement in which case it would be necessary to retain this deleted language.)

Purpose/Intent: Elimination of language no longer needed.

4.6 (d) Aqueduct Facilities Capital Charge

New: The safeguard for Agency revenue, which allows for additional aqueduct charges (pick-up charges) to be levied in the event of deficient revenue in any year has been added.

Purpose/Intent: Continue to provide the safeguard for pick-up charges on all aqueducts in the event revenues necessary to make Revenue Bond payments falls short.

4.6 (e) Aqueduct Facilities Capital Charge

New: Continue to provide method for establishing an aqueduct replacement charge. (It should be noted that no provision for a replacement charge for the Intertie Aqueducts is provided for – either in the Eleventh Amended Agreement or this draft.)

Purpose/Intent: Continue to provide method to allow both funding of and collection of a replacement charge to be used to replace aqueduct facilities as necessary.

4.14 Operation and Maintenance Charge – Watershed Planning and Restoration

New: While the parties reviewed very similar language in September 2003, no consensus was reached on how to pay for watershed planning and restoration charges. Language

proposed by the Agency follows. It creates a new fund for to provide for expenditures for ESA and environmental mitigation costs. This fund would be separate from and in addition to expenditures made from the Russian River Projects Fund for fishery mitigation and enhancement expenditures.

“(a) The Agency shall calculate and collect as a part of the Operations and Maintenance Charge a Watershed Planning and Restoration Sub-Charge.

(b) The aggregate amount of money to be received by the Agency from the Watershed Planning and Restoration Sub-Charge in each fiscal year shall be sufficient to produce water sale revenues to cover the Agency’s estimate of costs for such fiscal year (net of funding provided by other sources and funding otherwise authorized by this agreement) of carrying out: (1) fishery mitigation, enhancement, and environmental compliance projects undertaken by the Agency, including the Agency’s costs of complying with the Endangered Species Act or any other applicable federal, state, or local environmental statute or regulation, if such projects and costs are reasonably necessary, in the Agency’s judgment, to enable the Agency to provide water to regular customers under this agreement; and (2) actions, studies or projects authorized pursuant to section 2.8 of this agreement that are not covered by other funding sources and contributions.

(c) The Agency shall use its best efforts to amend its existing contracts with Russian River Customers to require Russian River Customers to pay the Watershed Planning and Restoration Sub-Charge or fund or implement watershed planning and restoration projects at a level equivalent to that funded by the Agency under this agreement.

(d) In addition to the Watershed Planning and Restoration Sub-Charge, the Agency may assess against the water contractors such supplemental charges as are authorized and agreed to under section 2.8(c). Supplemental charges under this subsection shall not be included in determining the minimum payments by other Agency customers pursuant to section 4.12 or by Windsor pursuant to section 4.17.

(e) All money received by the Agency in payment of the Watershed Planning and Restoration Sub-Charge shall be deposited by the Agency into a Watershed Planning and Restoration Fund and used for the purposes set forth in section 4.14(b). All money received by the Agency in payment of any supplemental charges pursuant to section 4.14 (d) shall be deposited into separate account(s) and used to pay the costs of projects authorized and agreed to pursuant to section 2.8(c).”

Purpose/Intent: To regularize the method for financing activities contemplated by the section.

4.15 Operation and Maintenance Charge – Recycled Water and Local Supply

Modified: Parties had not reached agreement on recycled water and local supply project provisions. Agency draft does not include a cap on the charge nor many of the provisions last discussed by the parties in October 2003. Agency language is as follows:

“The Agency shall calculate and collect as a part of the Operations and Maintenance Charge a Recycled Water Sub-Charge. The Recycled Water Sub-Charge shall be a uniform charge per acre-foot and shall be paid by all regular customers or Russian River Customers for all water taken from the Transmission System or under the Agency’s water rights. The aggregate amount of money to be received by the Agency from the Recycled Water Sub-Charge in each fiscal year shall be sufficient to produce water sale revenues to cover the Agency’s estimate of its costs for such fiscal year to carry out the provisions of section 2.6. The Agency shall use its best efforts to amend its existing contracts with Russian River Customers to require Russian River Customers today the Recycled Water Sub-Charge. Monies collected from the Recycled Water Sub-Charge shall be deposited in a Recycled Water Fund created by the Agency. The Recycled Water Fund shall be used only to pay or partially pay for the costs of recycled water projects or the acquisition of recycled water or the rights thereto pursuant to section 2.6 of this agreement.”

Purpose/Intent: Provides a mechanism for funding recycled water and local supply projects. Section 2.6 limits projects to those approved by WAC.

Part 5 – Water Advisory Committee

5.3 Water Advisory Committee - Powers

Subsection (a)

Modified: In last sentence of this subsection, Language has been added re. documentation of WAC actions as follows:

“If the approval, determination, or consent of the Water Advisory Committee is authorized or required on any non-advisory matter pursuant to this agreement, the vote of the Water Advisory Committee on such matter shall be evidenced by a writing, executed by the chairperson or secretary, evidencing (a) the vote of each member, (b) whether the vote of the committee was in the affirmative, and (c) if the vote was in the affirmative, a description of the approval, determination, or consent given by the Committee.”

Purpose/Intent: Given additional responsibilities for WAC under the draft agreement, this section adds language requiring that WAC decisions be sufficiently recorded and memorialized.